

Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit**

PETITION FOR CERTIORARI FILED JUNE 14, 1979

CERTIORARI GRANTED OCTOBER 1, 1979

In the
Supreme Court of the United States

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PLAINTIFFS

DEFENDANTS

CIV - 77-0816 T

Walker, Fred N.

Armco Steel Corporation, A Corporation

CLOSED APR 18 1978

ATTORNEYS LIEN
CLAIMED

CAUSE

28 USC 1332 - Damages re personal injury result of head on nail shattering when hit, striking Pltf. in the eye.

rw

FOR PLAINTIFFS

ATTORNEYS

FOR DEFENDANTS

Don Manners, Of Manners, Grennan, Cathcart, &
Lawter, 1510 N. Klein, OC 73106
236-4534

Looney, Nichols, (Burton J.) Johnson & Hayes
219 Couch Dr, OC 73102
& Richard L. Keirsey

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UNITED STATES DISTRICT COURT DOCKET

DC-111 (rev. 1)

CIV-77-086T

DATE	NR.	PROCEED
8-19-77		Filed Complaint
"		" prae for & iss'd summons
12-5-77		Filed USM's Ret re Summons: Served The Corporation Company 12-1-77
12-21-77		Filed dft's Answer - ws
1-5-78		Filed dft's Mtn to Dism - ws
"		" Brief in Sup of Above Mtn - ws
1-12-78		Ent Order directing plf to file response w/brief w/i 20 days herefrom to dft's mtn t dism (Thompson) afj ws
2-1-78		Filed plf's Reply Brief to Dft's Mtn to Dism - ws
3-1-78		Filed Dft's Response to Plf's Reply Brief -w/s
4-18-78		Filed <u>AND ENTERED</u> Order - THAT dft's Mtn to Dism is grtd, & plf's compl is, by this order, dismd (Thompson) (COB #125) (Clerk) (Copies to parties - afj)
5-16-78		Filed Notice of Appeal of plf from final order sust. dft's mtn to dism. entered Apr 18, 1978 (record due in CCofA 6-26-78)
5-18-78		Filed Clerk's letter re service of notice of appeal, w/copy ltr, notice of appeal and d.s.to counsel & CCofA

IN THE UNITED STATES DISTRICT COURT IN AND
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
AUG 19 1977
REX B. HAWKS, CLERK
U. S. DISTRICT COURT

FRED N. WALKER)	
)	
Plaintiff,)	
vs)	Case No.
)	CIV-77-0816-T
ARMCO STEEL CORPORATION,)	
A Corporation)	
Defendant.)	

PETITION

COMES now the plaintiff, Fred N. Walker and for his cause of action against the defendant, Armco Steel Corporation, alleges and states the following particulars to wit:

I

That the plaintiff is a resident of the State of Oklahoma. The defendant is a foreign corporation, having its principal place of business in a state other than the state of Oklahoma. The amount in controversy is in excess of \$10,000.00. Since the cause of action herein arose in Oklahoma County, Oklahoma and because the defendant is doing business in this State and can be served with process through its service agent, The Corporation Company, 735 First National Center, Oklahoma City, Oklahoma, the United States District Court for the Western District of Oklahoma has jurisdiction of the parties to and the subject matter for this action.

II

The defendant, at the time of the accident, was engaged in the business of manufacturing, selling and distributing the product, which is the subject matter of this

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action, which is known as a sheffield nail. This nail was being pounded into a cement wall. At approximately 9:00 on the morning of August 22, 1975 at 200 N. W. 5th in Oklahoma City, Oklahoma County, Oklahoma, while the plaintiff, who is a carpenter, was pounding the nail into the wall, the nail, in question, contained a defect which caused the head of the nail to shatter and to hit the plaintiff directly in the right eye, causing severe and dramatic injuries and damages to him. The particular acts of negligence and carelessness on the part of the defendant will be hereinafter more fully set forth and enumerated.

III

The plaintiff further alleges and states that the defendant was negligent in one or more of the following particulars:

(a) The defendant made, manufactured, sold and distributed said product into the market in normal and ordinary channels and streams of commerce, when the defendant knew and could reasonably foresee that said product would be used by the intended or foreseeable users of said product without such persons inspecting it for defects and that any such defect would not be discovered by a person such as the plaintiff.

(b) The defendant transferred, sold, distributed and manufactured said product into the channels of commerce in a defective and unreasonably dangerous condition and that it was unsafe and unfit for the use of which it was intended as a nail, at the time they sold and parted with control of said product.

(c) The defendant placed said product into the normal channels of commerce when they knew said product was designed and manufactured and was unreasonably dangerous to an extent beyond that, which would be contemplated by the ordinary consumer purchaser in a community.

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(d) The defendant failed to design and impliment an adequate safeguard on said product.

(e) The defendant violated the prevailing customs and usage standards in the nail industry business.

IV

The plaintiff further alleges and states as direct and proximate result of one or more of the foregoing acts of carelessness and negligence on the part of the defendant that the defendant's nail did puncture and wound the plaintiff's eye severely injuring the plaintiff and without this negligence on the part of the defendant this would not have occurred.

V

The plaintiff further alleges and states that plaintiff suffered injury to plaintiff's right eye, causing blindness in that eye. That plaintiff has also suffered due to the negligence of the defendant, traumatic neurosis. That plaintiff sustained profound mental and nervous shock; the plaintiff has severe and protracted headaches, dizziness and instability; that plaintiff's injuries are permanent and progress to plaintiff in the sum of Five Hundred Thousand Dollars (\$500,000.00), for which plaintiff prays judgment against the defendant.

VI

The plaintiff further alleges and states that plaintiff has incurred expenses for medical treatment and drugs for which plaintiff prays judgment. In this connection the plaintiff will incur additional expenses for future medical treatment for all of which plaintiff prays judgment.

VII

The plaintiff further alleges and states that at the time of the plaintiff's injuries here and before set forth the plaintiff was 45 years of age. In this connection, the plain-

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tiff has suffered a loss of earning capacity and has therefore been damaged in earning capacity for which the plaintiff prays judgment against the defendant.

WHEREFORE, the plaintiff prays judgment prays judgment on his cause of action against his defendant in the total sum of Five Hundred Thousand Dollars (\$500,000.00), all Court costs incurred herein, and for such other relief as the Court may deem just and proper.

DON MANNERS

(s) *Don Manners*

Attorney for the Plaintiff

1510 North Klein

Oklahoma City, OK 73106

(405) 236-4534

ATTORNEYS LEIN CLAIMED

(s) *Don Manners*

U.S. MARSHALS SERVICE		INSTRUCTIONS: See "INSTRUCTION" FOR SERVICE OF PROCESS BY THE U.S. MARSHAL on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.	
INSTRUCTION AND PROCESS RECORD			
PLAINTIFF	FRED N. WALKER		
DEFENDANT	ARMCO STEEL CORPORATION, A Corporation		
SERVE	NAME OF INDIVIDUAL COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN		
	THE CORPORATION COMPANY		
ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)	735 First National Center Oklahoma City, Oklahoma 73102		
AT	SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:		
	DON MANNERS 1510 North Klein Oklahoma City, Oklahoma 73106		
SPECIAL INSTRUCTIONS		SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.	
Personal service on The Corporation Company, named service agent for the defendant, Armco Steel Corporation		OFFICE OKLAHOMA	
NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR		TELEPHONE NUMBER	DATE
By:		(405) 236-4534	August 19, 1977
SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE			
DEPOSIT/AMOUNT	DIST. OF ORIGIN	DIST. OF ORIGIN TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
DEPOSIT/AMOUNT	DIST. OF ORIGIN	DIST. OF ORIGIN TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK		DATE	
12/1/77		12/1/77	
I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.			
I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.			
NAME AND TITLE OF INDIVIDUAL SERVED (if not shown above)			
ADDRESS (Complete only if different than shown above)			
DATE(S) OF ENDEAVOR (Use Remarks if necessary)			
SIGNATURE OF U.S. MARSHAL OR DEPUTY			
FEE (if applicable)			
MILEAGE			

INITIAL DEPOSIT: -0-
 COST FOR SERVICE: 3.00
 BALANCE DUE: 3.00

Please make remittance payable to
 U. S. MARSHAL, BOX 886,
 OKLAHOMA CITY, OKLA. 73102

DEC 6 RECD

12-5-77

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

F I L E D

JAN 5 1978

HERBERT T. HOPE, CLERK
U. S. DISTRICT COURT
By Irene Higginbotham, Deputy

FRED N. WALKER,)
Plaintiff,)
vs.) NO: CIV-77-0816-T
ARMCO STEEL CORPORATION,)
Defendant.)

MOTION TO DISMISS

COMES NOW the Defendant, Armco Steel Corporation, and respectfully moves that this Court dismiss the above action, commenced by the Plaintiff herein, Fred N. Walker, for the reason that the service of summons issued in this matter was not served within the time prescribed by law under the Statutes of the State of Oklahoma.

LOONEY, NICHOLS, JOHNSON & HAYES

By (s) Richard L. Kiersey

Richard L. Kiersey

219 Couch Drive

Oklahoma City, Oklahoma 73102

ATTORNEYS FOR DEFENDANT

[Certificate of Mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FRED N. WALKER,)
Appellant,)
vs.) No. 77-0016-T
ARMCO STEEL CORPORATION,)
Appellee.)

ORDER

Jurisdiction in this action, for personal injury, is founded upon 28 U.S.C. §1332. Plaintiff's complaint states that he received injuries from defendant's tortious acts on August 22, 1975. Complaint was filed August 19, 1977, three days before the action would have been barred by the Oklahoma statute of limitations. Defendant was served with process on December 1, 1977. Defendant's motion to dismiss presents an essentially simple question which has no concrete answer in this jurisdiction; i.e., when is an action "commenced" in federal court, so as to toll the statute of limitations?

The Oklahoma statute of limitations for tortious injuries is two years. 12 O.S. 1971, § 95. An action is commenced in state court when process issues, provided process is actually served within sixty (60) days after the attempt is made. 12 O.S. 1971, § 97; *Lake v. Leitch*, 550 P.2d 935 (Okl. 1976). Plaintiff admits that had this action been filed in state court and service not made until December 1, it would be barred by the statute of limitation.

In federal court, an action is commenced when the complaint is filed. Rule 3, Federal Rules of Civil Procedure. Until 1965, Rule 3 was construed so as to incorporate the entire state statutory scheme for tolling the statute of limitations into federal procedure. *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949); *Murphy v. Citi-*

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zens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957). However, in *Hanna v. Plumer*, 380 U.S. 460 (1965), the Supreme Court, in determining propriety of service, relied on Federal Rule 4d, rather than state law, which was in conflict. The Court in *Hanna* did not overrule *Ragan v. Merchants Transfer & Warehouse Co.*, supra, in fact, *Ragan* was distinguished by the *Hanna* Court at page 469. However, following the *Hanna* decision, the circuits have been in conflict as to whether state law or Federal Rule 3 governs commencement of a suit. The majority rely on *Ragan* and determine commencement of suit by applying state law. *Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160 (3rd Cir. 1976); *Anderson v. Papillion*, 445 F.2d 841 (5th Cir. 1971); *Groninger v. Davison*, 364 F.2d 638 (8th Cir. 1966); *Sylvester v. Messler*, 246 F. Supp. 1 (E.D. Mich. 1965), aff'd 351 F.2d 472 (6th Cir. 1965), cert. denied 382 U.S. 1011. See also *Dial v. Ivy*, 370 F. Supp. 833 (W.D. Okl. 1974), where the Court held that the state statute controlled, without commenting on *Hanna*. For the minority view, see *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2nd Cir. 1968).

The Tenth Circuit has withheld decision on this issue. In *Chappell v. Rouch*, 448 F.2d 446 (10th Cir. 1971), the Tenth Circuit was presented with a question of whether Kansas law or the Federal Rules of Civil Procedure governed the commencement of suit so as to toll the Kansas statute of limitations. The trial court had overruled a motion to dismiss, holding that Federal Rule 3 determined when suit was commenced because *Hanna v. Plumer* had "modified *Ragan* to the end that the federal rule, rather than the state statute, controls and fixes the time the action was commenced." (*Chappell* at 448.) The Tenth Circuit commented on the trial court's ruling, stating:

"In our view of the matter, however, *Ragan* is distinguishable on its facts from the instant controversy and though we agree that *Hanna* governs, we need not here come to grips with the intriguing question as to

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whether *Hanna* overrules *Ragan*, a matter on which there is considerable differences of judicial thought." *Id* at 448.

The Court went on to distinguish the *Ragan* rule from the facts before it. The Kansas statute relied on by the defendant was not an "integral" part of the Kansas statute of limitations. The Kansas statute defining commencement of actions was in the chapter on civil procedure and was not inextricably intertwined with the statute of limitations. The chapter entitled "Limitation of Actions" had no provision defining when and how commencement of actions would toll the statute of limitations. The Court summarized and concluded as follows:

"The narrow issue now to be resolved is whether we are prepared to hold that K.S.A. 60-203 (defining commencement of suit) is an 'integral part' of K.S.A. 60-501 and 60-513 (4) (statute of limitation). If we do so hold, then *Ragan* would control, assuming *Ragan* has not been modified, if indeed not overruled, by *Hanna*. As indicated, we need not here make that determination as in our view K.S.A. 60-203 is not under the circumstances an integral part of K.S.A. 60-501 and just what the Kansas legislature declared it to be, a statute setting forth a rule of civil procedure. So, it boils down to a determination as to whether a Kansas statute promulgating a rule of civil procedure as to when an action is commenced takes precedence in the federal courts over Fed.R.Civ.P. 3, with which it is in direct conflict. All of which brings into play the rule of *Hanna*." *Chappell*, at 449.

The Oklahoma statute before the Court today is an integral part of the Oklahoma statute of limitations. 12 O.S. 1971, § 97, defining commencement of suit, is codified in the chapter entitled "Limitations of Actions". Section 97 states that "an action shall be deemed commenced, within

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the meaning of this article, as to each defendant, at the date of the summons which is served on him . . ." (Emphasis added). The preceding sections in the article define the statute of limitations for various types of injuries. 12 O.S. 1971, §97 is an integral part of the Oklahoma statute of limitations and would bar this suit if *Ragan* is still the law.

Having no express ruling from the Tenth Circuit on the effect of *Ragan* on these facts, this Court is free to treat the question as one of first impression. The Court is persuaded that *Hanna* did not overrule *Ragan*. The United States Supreme Court has not been shy to overrule cases expressly, and the fact the Supreme Court not only did not overrule *Ragan*, but in fact distinguished it, in *Hanna*, persuades this Court that *Ragan* still controls. Even limiting *Ragan* to its facts, dismissal of this suit is required. The Oklahoma definition of commencement of action is an integral part of the Oklahoma statute of limitations. The rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) requires that in diversity cases, litigants in federal court receive no advantages over those in state court. To ignore the Oklahoma statute in question here would give plaintiff greater rights in federal court than he would receive in state court a result not allowed after *Erie*.

Plaintiff's complaint, on its face, is barred by the Oklahoma statute of limitations and the Oklahoma definition of commencement of suit. Accordingly, defendant's Motion to Dismiss is granted, and plaintiff's complaint is, by this order, dismissed.

It is so ordered this 18th day of April, 1978.

(s) *Ralph Thompson*
United States District Judge

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1477

FRED N. WALKER,)	Appeal from
Plaintiff-Appellant,)	the United States
)	District Court
v.)	for the
)	Western District of
ARMCO STEEL CORPORATION,)	Oklahoma (D.C.
a corporation,)	No. 77-0816-T)
Defendant-Appellee.)	

Submitted on the briefs.

Don Manners of Manners, Cathcart & Lawter, Oklahoma City, Oklahoma, for the Plaintiff-Appellant.

Burton J. Johnson and Richard L. Kiersey of Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Defendant-Appellee.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a Calendar C case.

This is a diversity action which raises the question whether Rule 3 of the Federal Rules of Civil Procedure or § 97 of Okla. Stat. title 12 (West Supp. 1978) determines when a case is filed in the Federal Court. Is it a state law or federal question? The underlying problem is whether *Ragan v. Merchants Transfer & Warehouse Co.*,

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337 U.S. 530 (1949) or *Hanna v. Plumer*, 380 U.S. 460 (1965) governs.

The United States District Court for the Western District of Oklahoma dismissed the action on the ground that it was outlawed by the statute of limitations in Oklahoma because it had not been filed in accordance with the Oklahoma rule; that although the case was actually filed in time, process was not served within the period of limitations prescribed by the Oklahoma statute. The trial Court reasoned that the Oklahoma filing rule was integrated in the pertinent Oklahoma limitations provision. The trial Court ruled that *Hanna v. Plumer, supra*, did not expressly overrule *Ragan v. Merchants Transfer & Warehouse Co., supra*, and, therefore, the latter case governed.

The facts are these:

Appellant Walker suffered an injury when a nailhead fragmented and hit his right eye, on August 22, 1975, while he was engaged in his work. The suit against Armco Steel Corporation, the manufacturer of the nail, alleges that the nail was defective. The complaint was filed in the Clerk's office of the United States District Court for the Western District of Oklahoma on August 19, 1977. Summons was issued the next day. For reasons which do not appear in the record, process was not served on Armco until December 1, 1977. On January 5, 1978, Armco filed a Motion to Dismiss Plaintiff's complaint asserting that the statute of limitations barred the action. The Motion was granted on April 18, 1978. The date of filing was three days prior to the date that the two-year statute would have barred the action. The issue, as indicated above, is when, if ever, the statute of limitations is tolled.

The Oklahoma statute which was relied on by the trial Court and which is here sought to be applied reads:

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the

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date of the summons which is served on him or on a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. At attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons, within sixty (60 days).

Okla. Stat. Ann. tit. 12, § 97 (West Supp. 1978).

The above statute makes provision for faithful and diligent endeavor to procure service if it is carried out within sixty (60 days) of date of issuance, provided the summons is issued within the limitations period. Although the summons here was shown to have been issued on time, the service was not completed within sixty (60 days), nor is there any evidence that there was a diligent attempt to procure service. Therefore, the only hope which the plaintiff-appellant could entertain would be that the federal procedural provision would be ruled applicable.

There is another provision in the Oklahoma compilation, Okla. Stat. Ann. tit. 12, § 151 (West Supp. 1978), which provides that:

A civil action is deemed commenced by filing in the office of the Court Clerk of the proper Court a petition and by the clerk's issuance of summons thereon. Where service by publication is proper, the action shall be deemed commenced at the date notice of publication is signed by the Court Clerk. Where service is sought to be effected by mailing, the action shall be deemed commenced when the envelope containing summons,

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addressed to the defendant or to the service agent, if one has been appointed, is deposited in the United States mail with postage prepaid for forwarding by certified mail with a request for a return receipt from addressee only.

There is no indication, however, that this adds anything to § 95 and 97, both of which are construed by the Oklahoma Court of Appeals and the Supreme Court as limitation provisions.

The applicable Federal Rule is free of all of these complications. Rule 3 of the Federal Rules of Civil Procedure simply provides: "A civil action is commenced by filing a complaint with the Court."

The question which we must consider is whether the Oklahoma statute, § 97, must be applied as the trial Court applied it or whether Rule 3 of the Federal Rules of Civil Procedure should have been held to govern. The underlying issue is whether the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) is, consistent with the basic diversity notion that a Federal Court, sitting in diversity cases and administering state law, must apply not only substantive law of the forum state, but procedural law as well if the application of state procedural law changes the outcome of the case.

Unquestionably, § 97, *supra*, (the Oklahoma statute), is in direct conflict with Rule 3 of the Federal Rules of Civil Procedure with respect to what constitutes a filing which will toll the statute of limitations. That the Oklahoma provision is not only a filing provision but a limitations one was well is to be gleaned from the statute as well as the cases. See, for example, *Tyler v. Taylor*, Okl. App., 478 P.2d 1214 (1977), and *State ex rel. Roacher v. Caldwell*, Okl., 522 P.2d 1031 (1974). So even though the Oklahoma statute may be complex and even mysterious as compared with the federal provision in that it obligates the

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litigant not only to timely file the case but also to see that process issues and that the adversary is served on time in order to toll the statute of limitations, it is the law of Oklahoma. The fact that the local law appears technical and cumbersome is not a factor to be weighed. The controlling aspect is whether the outcome of the case is changed as a result of applying or not applying the state rule.

In support of the mentioned approach, defendant-appellee urges that the Supreme Court's decision in *Ragan v. Merchants Transfer & Warehouse Co.*, *supra*, which held state law to be applicable in deciding when a case has been filed for purposes of tolling the statute of limitations, governs. *Ragan*, it is to be noted, is a decision which originated in this circuit, and a Kansas statute similar in terms to the Oklahoma statute before us (§ 97, *supra*), was applied in preference to the federal rule on the same subject. As in the present case, the Kansas statute required filing of the complaint, issuance of the summons and service of the summons. All of these were tied to the limitations statute. Indeed this Court upheld the District Court determination that the requirement of service of summons within the statutory limitation "was an integral part of that state's statute of limitations."

Ragan, of course, religiously followed *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). The outcome test was thus held to apply even in this area of pure procedure. The question boils down to whether *Ragan* must be applied here.

The Supreme Court's decision in *Hanna v. Plumer*, *supra*, gave promise that the corner had been turned so to speak, as far as *Guaranty* and *Ragan* continuing to dominate where the question is one of pure procedure such as we have here. *Hanna* construed a Massachusetts statute which had the same kind of complicated statute with respect to mode of service of process as we find here. In

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Hanna, as here, the application of the outcome test would have resulted in the state law being applied and in the defendant prevailing. In the opinion which was written by Chief Justice Warren, the outcome determinative test was rejected and the Federal Rules of Civil Procedure were ruled applicable. However, the Court in a footnote distinguished *Ragan* even though *Ragan* had applied the outcome determinative test which the Court was engaged in rejecting at least to the extent that pure procedural questions were being decided. The *Hanna* opinion observed that every procedural variation is in fact outcome determinative. The Court acknowledged that the outcome determinative test would have a marked effect on the outcome of litigation before it. It said, however, that the test was not to be regarded as a talisman. Inasmuch as *Ragan* is based entirely upon the *Guaranty Trust* conception that outcome determinative is the answer, the refusal of the Court to apply this result in the *Hanna* decision is irreconcilable with that in *Ragan*.

We simply point up the dilemma. We do not do so in any spirit of criticism. The present problem is, however, that the Supreme Court in *Hanna*, although it could be said to have shown dissatisfaction with *Ragan*, did not expressly overrule it. Professors Wright and Miller have pointed this out and have noted also that the Supreme Court knows how to overrule a case when it wishes to do so. They further observe that *Ragan* has continued vitality. See 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1057 at 190-191 (1969). It is true, however, that although the circuits are divided on the question, the preponderance of the circuits and the district courts within the circuits support the view that *Ragan* continues to be viable.

More recently this Court rendered an opinion which selected Rule 3 of the Federal Rules of Civil Procedure. This was in *Chappell v. Rouch*, 448 F.2d 446 (10th Cir. 1971). This action arose in Kansas as did *Ragan*, but the

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statute which was considered in *Ragan* had been modified. The reasoned opinion by Judge McWilliams concluded that *Ragan* was not binding in view of this fact. The Oklahoma statute which we consider, however, is indistinguishable from the statute which was construed in *Ragan*, so even if we were desirous of applying Rule 3, which we are, we are not free to do so. (This writer at least would prefer the federal rule).

This Court has recently issued its opinion in *Lindsey v. Dayton-Hudson Corp.*, No. 77-1051. The opinion by Judge Logan is extremely well presented and it too adopts the view that *Ragan* continues to be authoritative.

We recognize that decisions are frequently allowed to die on the vine, so to speak. We also recognize that in such instances death does not, as a practical matter, take place. If, however, *Ragan* was intended to die a natural death, it failed to happen.

In the Tenth Circuit we have in addition a judicial administration problem, because since the *Ragan* case originated here it continues to be the law of this circuit. The Tenth Circuit affirmed the trial Court's decision, and the Supreme Court not only affirmed the Tenth Circuit, but lavishly praised the decision as well.

The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between *Ragan* and *Hanna*. So far it has not done so, and until the Supreme Court acts we feel constrained to follow *Ragan*.

Accordingly, the judgment of the District Court is affirmed.
